Singapore Journal of Legal Studies
[2009] 272–282

A PROBABLE REFORM OF CONSIDERATION

Gay Choon Ing v. Loh Sze Ti Terence Peter and Another Appeal[1]

WU ZHUANG-HUI*

I. INTRODUCTION

> Because so much academic ink has been spilt on the doctrine of consideration over so very many decades (with no concrete action being taken) and because there is … such a dearth of cases on the doctrine itself, it would appear that any proposed reform of the doctrine is much ado about nothing … However, because the doctrine of consideration *does* contain certain basic weaknesses which have been pointed out, *in extenso*, in the relevant legal literature, it almost certainly needs to be reformed. The basic difficulties and alternatives have been set out briefly above but will need to be considered in much greater detail when the issue next comes squarely before this court.[2]

Although the issue of reform did not arise for decision before the court in *Gay Choon Ing v. Loh Sze Ti Terence Peter and Another Appeal*, it is clear that when it eventually does, the court or even the legislature would have to decide whether, and if so, how to reform the doctrine of consideration. It is submitted that how far we ought to extend the limits on the enforceability of otherwise legally-binding agreements depends upon the focus with which we view the role of the doctrine of consideration.

---

* B.A. Hons (Oxon); Adjunct Faculty, School of Law, Singapore Management University. I am grateful to Professor Adrian Briggs for his guidance and assistance in amending drafts of this note, as well as to an anonymous referee for his/her insightful comments. Any errors or omissions are entirely my own.

1 [2009] SGCA 3.

2 *Ibid.* at para. 117 (emphasis in original).

II. Decision Of The Court Of Appeal

A. *The Facts of the Case*

The plaintiff, Loh, and the defendant, Gay, had shared a close friendship for over 30 years.[3] Loh was the managing director and a shareholder of ASP Company Limited ("ASP"), and in 1981, had asked Gay to move to Kenya to join ASP as its general manager. Gay worked for Loh from 1981 to 2004, reporting to Loh often by e-mail.[4] Separately, Gay was a shareholder in his family business, Gay Lip Seng & Sons (Pte.) Ltd. ("the Company"),[5] which had decided in 1993 to redevelop a Hotel that it owned and operated. It was agreed at a shareholders meeting that $3 million represented the value of the Hotel's property, and that for each one share currently held, an additional 299,999 shares would be issued. The Company increased its authorised capital to $5.5 million.[6] Although the bank had agreed to finance the construction (estimated to be at $5.5 million), it required a 20% contribution by the shareholders. Gay agreed to invest $2.5 million in return for 2.5 million shares,[7] and approached Loh to raise this money.

Loh alleged that Gay approached him to "entice him into investing in the Company" to enable the rebuilding and redeveloping of the Hotel. Gay, in turn, alleged that Loh "readily agreed to extend a *loan*", and that he confided in Loh that he would prefer to secure the loan and to pledge an equivalent number of shares to Loh.[8] Whether the money extended was an investment or a loan, it is clear that Gay had issued shares to Loh pursuant to this arrangement, as documented in a Trust Deed.[9] Gay understood this document to mean that the $1.55 million would be *lent* by Loh to him. However, Loh understood it to be an *investment* and that Gay held the shares on trust for him.[10]

Relations between the parties began to sour in August 2003, when Gay indicated that he wished to retire from ASP, and asked Loh for a retirement sum to be paid, as was apparently the practice of ASP. Although Gay was persuaded to stay for another year, he wrote to Loh in July and August 2004 reiterating his desire to retire.[11] Loh had felt betrayed by Gay's decision to leave,[12] and their relationship took a turn for the worse with Loh accusing Gay of withholding information and treating the Trust Deed as an investment instead of a loan, and Gay increasingly exasperated by the deepening rift between them.[13] In their e-mail negotiations, the parties recognised their past bond as friends, and had agreed to resolve the matter amicably instead of seeking to litigate.[14]

---

3 *Ibid*. at para. 12.
4 *Ibid*. at para. 13.
5 *Ibid*. at para. 15.
6 *Ibid*. at para. 16.
7 *Ibid*. at para. 17.
8 *Ibid*. at para. 18 (emphasis in original).
9 *Ibid*. at para. 19.
10 *Ibid*. at para. 20.
11 *Ibid*. at paras. 22–23.
12 *Ibid*. at para. 24.
13 *Ibid*. at paras. 25–27.
14 *Ibid*. at paras. 28–29.

In October 2004, the parties signed a Points of Agreement ("POA") document, stating that Loh would sell Gay his beneficial interest in the Company shares.[15] On that same day, a waiver letter was sent to Gay by Loh, as managing director of ASP, stating that Gay had agreed to resign without claims on ASP whatsoever, and that in turn, ASP had acknowledged that it had no claims against Gay. This waiver letter was signed by both parties.[16] However, tempers flared up again,[17] and in March 2005, the parties, through their lawyers, disputed the sum that ought to have been paid for the shares.[18]

The High Court decided in favour of Loh, and ruled that Gay held the shares on trust for the benefit of Loh, that the POA between the parties be rescinded, and that Gay account for dividends payable to Loh in respect of the shares, which dividends were first declared by the Company in 1999 right up to recent times. Gay appealed against the trial judge's decision.[19] Loh, in turn, appealed against various aspects of the trial judge's decision, including one that as a condition to the rescission of the POA, he was to hand over the sum of $1.5 million to Gay, that he was not entitled to 61.9% of the shares of the company, and that Gay was not in breach of his duties as trustee and at law in failing to offer him the proportion of the shares held on trust.[20]

B. *Decision Based on the Law of Compromise*

Interestingly enough, when these issues were brought before the Court of Appeal, the Court held that they had missed "the real focal point of the dispute", and instead the key inquiry was whether or not the POA and the waiver letter "constituted a valid compromise agreement between the parties".[21] This was dealt with tangentially by the parties themselves, and was therefore dealt with only as a subsidiary issue by the trial judge.[22] The Court found the findings and reasoning by the trial judge "with regard to all the remaining issues to be both meticulous as well as correct", and hence focused only on whether or not the parties had concluded a valid compromise agreement.[23] It then differed from the conclusion of the trial judge that they had not.

By way of explaining its finding that the parties had concluded a valid compromise agreement, the Court of Appeal first made reference to the leading Commonwealth textbook on compromise and settlements, which stated that the essential foundation of compromise was the ordinary law of contract.[24] It followed that the general principles of contract law should "apply with equal force to the law of compromise" as in other contractual contexts, and that a compromise will not arise unless what is traditionally required under the general common law of contract is fulfilled, "*viz*, an identifiable agreement that is complete and certain, consideration, as well as the intention to

---

15 *Ibid*. at para. 30.
16 *Ibid*. at para. 31.
17 *Ibid*. at paras. 33–34.
18 *Ibid*. at paras. 35–36.
19 *Ibid*. at para. 37.
20 *Ibid*. at para. 38.
21 *Ibid*. at para. 39.
22 *Ibid*. at para. 11.
23 *Ibid*. at para. 40.
24 David Foskett, *The Law and Practice of Compromise*, 6th ed. (London: Sweet & Maxwell, 2005) at 1-01.

create legal relations".[25] Applying these requirements to the facts of the case, the Court held that the POA and the waiver letter had constituted a valid compromise agreement,[26] and therefore dismissed Loh's appeal while allowing Gay's appeal.

Discussing the doctrine of consideration as a pre-requisite for a valid compromise, the Court noted that the doctrine "has been heavily criticised" and that there have "even been calls for its abolition". However, the Court recognised that the doctrine itself has weathered such criticism and is still a standard requirement before a valid contract can be said to have been formed.[27] Applying the requirement of consideration to the facts, the Court found that Gay's promise to relinquish his claims against ASP for severance pay constituted sufficient consideration in return for Loh's promise.[28] The Court also found that "no issue of past consideration" had arisen on the facts,[29] and there were no other "legal impediments" from the perspective of the doctrine of consideration.[30]

C. *Further Observations on the Doctrine of Consideration*

However, what was unusual was that the Court of Appeal published a coda to its judgment specifically on the doctrine of consideration.[31] While strictly *obiter dicta*, the coda is bound to be seen as a significant statement on the doctrine of consideration in Singapore. The Court gave a summary of the history and rationale of the doctrine, before setting out the difficulties that exist, as well as the main alternatives available when the issue of reform does squarely arise in the future.[32] It is difficult to capture in concise terms the entire scope of the survey on the doctrine of consideration; but after setting out the alternative doctrines of promissory estoppel, economic duress, undue influence, unconscionability and even the requirement of writing, the Court concluded that "maintenance of the status quo (*viz*, the availability of both (a somewhat dilute) doctrine of consideration *as well as* the alternative doctrines canvassed above)" may well be "the *most practical* solution inasmuch as it will afford the courts a *range of legal options* to achieve a just and fair result in the case concerned".[33]

Yet at the same time, the Court noted that "problems of *theoretical* coherence may remain", and acknowledged that "because the doctrine of consideration *does* contain certain basic weaknesses … it almost certainly needs to be reformed".[34] While the Court emphasised that this was only a provisional view as the issue of reform was not before the court, it is submitted that this may leave the status of consideration in an unsatisfactory state. It is not clear what purpose does the coda actually serve, and especially since the issue of reform will certainly need to be considered when it next

---

25 *Supra* note 1 at para. 46.
26 *Ibid*. at para. 89.
27 *Ibid.* at para. 64.
28 *Ibid.* at paras. 79–87.
29 *Ibid*. at paras. 83–85.
30 *Ibid*. at paras. 86–87.
31 *Ibid*. at paras. 92–118.
32 *Ibid*. at para. 94.
33 *Ibid*. at para. 118 (emphasis in original).
34 *Ibid*. at para. 117 (emphasis in original).

comes before the court,[35] litigants and practitioners may find themselves left in some doubt as to what may now be held to constitute good consideration in Singapore law.

III. Some Perspectives On Consideration

Before we consider the issue of reform, a good starting point is to identify the purpose of consideration, followed by the practical difficulties within the doctrine that renders it unfit for this purpose. The Court stated that the modern purpose of the doctrine is to "put some legal limits on the enforceability of agreements, even where they would otherwise be legally binding".[36] Since no legal system will ever enforce *all* promises made,[37] it follows that the key issue is whether consideration does convincingly draw the line between promises that ought to, and ought not to be enforced. It seems that recent Singapore decisions have had different focuses when identifying consideration.

A. *The Marrow of Contractual Relationships–The Parties' Intention*

The Court of Appeal referred to two recent Singapore High Court judgments that had in fact commented on the doctrine of consideration.[38] In the first, *Chwee Kin Keong v. Digilandmall.com Pte. Ltd.*,[39] V.K. Rajah J.C. observed that:

> The modern approach in contract law requires very little to find the existence of consideration. Indeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration … the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. *The marrow of contractual relationships* should be *the parties' intention to create a legal relationship*.[40]

In this widely quoted passage,[41] Rajah J.C. seemed to suggest that the guiding factor for upholding contracts was the parties' intention to create a legal relationship. It then follows that if the purpose of consideration is to put legal limits on the enforceability of agreements, perhaps it should focus on ascertaining whether the parties had in fact intended the agreement to be contractual (as opposed to merely gratuitous).

This seems consistent with the earlier Court of Appeal decision in *Sea-Land Service Inc. v. Cheong Fook Chee Vincent*,[42] where Yong Pung How C.J. stated that:

> The main issue on appeal was whether the agreement to pay the respondent the enhanced severance pay was contractually unenforceable for lack of

---

35 *Ibid*. at paras. 117–118.

36 *Ibid*. at para. 98. See also H.G. Beale, ed., *Chitty on Contracts*, 30th ed. (London: Sweet & Maxwell, 2008) vol. 1 at 3-001 [*Chitty*].

37 See P.S. Atiyah, *Essays on Contract*, (Oxford: Clarendon Press, 1986) Essay 8, 179–241 at 181. See also B.J. Reiter, "Courts, Consideration, and Common Sense" (1977) 27 U.T.L.J. 439 at 439–440.

38 *Supra* note 1 at para. 95.

39 [2004] 2 S.L.R. 594 [*Chwee Kin Keong*].

40 *Ibid*. at para. 139 (emphasis added).

41 See *e.g.*, *Sunny Metal & Engineering Pte. Ltd. v. Ng Khim Ming Eric* [2007] 1 S.L.R. 853 at para. 28 and *Teo Seng Kee Bob v. Arianecorp Ltd.* [2008] 3 S.L.R. 1114 at para. 92.

42 [1994] 3 S.L.R. 631.

> consideration. If there was no consideration, the respondent would not be entitled to the declaration sought as it would *only be a gratuitous promise* by the appellants. Since the money had not been paid out to the respondent, *the 'gift' was not perfected* and the respondent would not be able to sue for it.[43]

While it was unusual that the language of "perfecting the gift" was used to describe the effect of consideration, the legal enforceability of the agreement seemed to have again depended upon the intention of the parties. The doctrine of consideration was applied to determine whether the agreement to pay the enhanced severance pay was intended as a contractual agreement or only as a gratuitous promise.

B. *The Element of Reciprocity—A Return Given in Exchange*

However, in the present case, the Court of Appeal seems to have favoured a slightly different formulation of the focus of consideration. The Court observed that:

> Very generally put, consideration signifies *a return* recognised in law which is *given in exchange* for the promise sought to be enforced. That is why it is stated as a matter of course that consideration *must always move from the promisee to the promisor*.[44]

Yet it is respectfully submitted that while consideration must always move from the promisee, it need not always move *to the promisor*.[45] The Court presumably adopted this general description to emphasise its focus on the element of reciprocity between the parties, rather than the intention with which the promise was made.

The difference in formulation is significant when determining the enforceability of an agreement. Should consideration focus on whether the parties had in fact intended the agreement to be contractual, emphasis would be put on the facts and circumstances in which the promise was made. On the other hand, should consideration focus more on reciprocity, emphasis would then be put on identifying whether or not there has been a return given in exchange, usually moving from the promisee to the promisor.

C. *Practical Difficulties within the Doctrine of Consideration*

The Court mentioned the English Court of Appeal decision of *Williams v. Roffey Bros & Nicholls (Contractors) Ltd.*,[46] and stated that the importance of *Williams* lies in its apparent endorsement of the much wider concept of consideration to the effect that "a *practical* benefit or detriment (as opposed to a (narrower) *legal* benefit or detriment) could constitute sufficient consideration in law".[47] The practical difficulty is that the

---

43 *Ibid*. at 633F (emphasis added).

44 *Supra* note 1 at para. 66 (emphasis added).

45 See generally *Chitty*, *supra* note 36 at 3-039. See also *Re Wyvern Developments Ltd.* [1974] 1 W.L.R. 1097; *International Petroleum Refining & Supply Ltd. v. Caleb Brett & Sons Ltd.* [1980] 1 Lloyd's Rep. 569 at 594; *Barclays Bank plc v. Weeks, Legg & Dean* [1998] 3 All E.R. 213 at 220–221.

46 [1991] 1 Q.B. 1 [*Williams*].

47 *Supra* note 1 at para. 70 (emphasis in original). For an earlier discussion before *Williams* on whether a legal benefit is necessary, see F.M.B. Reynolds & G.H. Treitel, "Consideration for the Modification of Contracts" (1965) 7 Mal. L. Rev. 1 at 4–9.

"combined effect" of *Williams* and the well-established proposition that consideration must be sufficient but need not be adequate, would mean that it will be "all too easy" to locate consideration between contracting parties, and would therefore render the requirement of consideration "otiose or redundant".[48] It is submitted that this puts an over-emphasis on the subjective intention of the parties, rather than reciprocity in the eyes of the law. The Court noted that it was therefore no surprise that *Williams* has been the subject of copious amount of academic commentary and critique,[49] and that it has also elicited judicial responses from other Commonwealth jurisdictions.[50]

The Court noted that while *Williams* related to the attempt by the promisee to enforce a promise to *pay more*, there was also another situation which relates, instead, to the attempt by the promisee to enforce a promise to *take less*.[51] The English Court of Appeal in *In re Selectmove Ltd.*[52] refused to extend the holding in *Williams* on the ground that it was bound by the House of Lords decision in *Foakes v. Beer*. However, no such constraint exists in the Singapore context, and the Court noted that this furnishes "another string to the legal bow" of those who seek the abolition of consideration.[53] The Court also considered the situations of promises to perform existing duties both imposed by *law* and owed to a *third party*, and again noted that no constraint of precedent prevents the Singapore courts from extending the reach of *Williams* to such situations.[54] The Court concluded that if *Williams* were extended to cover all three situations, the issue of the abolition of the doctrine of consideration would become "even more pronounced".[55]

IV. The Way Ahead For Possible Reform

Although the Court stated that it did not propose to "delve into the issue of possible reform" as it had not arisen for decision,[56] it nonetheless recognised that there was a need to consider difficulties engendered by legal impediments "*from the perspective of possible reform* when they are raised squarely for consideration" by the court or the legislature.[57] Surveying the wide range of views on reform, the Court recognised the view recommending the abolition of the doctrine,[58] the view in staunch support

---

48 *Ibid*. at para. 100. See also *Sunny Metal & Engineering Pte. Ltd. v. Ng Khim Ming Eric* [2007] 1 S.L.R. 853 at para. 30 and *Chwee Kin Keong*, *supra* note 39 at para. 139.

49 See generally Brian Coote, "Consideration and Benefit in Fact and in Law" (1990) 3 J.C.L. 23; Roger Halson, "Sailors, Sub-Contractors and Consideration" (1990) 106 L.Q.R. 183; John Adams & Roger Brownsword, "Contract, Consideration and the Critical Path" (1990) 53 M.L.R. 536.

50 See generally J.W. Carter, Andrew Phang & Jill Poole, "Reactions to *Williams v. Roffey*" (1995) 8 J.C.L. 248 [*Reactions*].

51 See *Foakes v. Beer* (1884) 9 App. Case 605 and *Pinnel's Case* (1602) 5 Co Rep 117a; 77 E.R. 237.

52 [1995] 1 W.L.R. 474.

53 *Supra* note 1 at para. 103.

54 *Ibid*. at paras. 104–109.

55 *Ibid*. at para. 110.

56 *Ibid*. at para. 93.

57 *Ibid*. at para. 87 (emphasis added).

58 See the UK Law Reform Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (Cmd 5449, 1937) [*UK Law Reform Committee Report*]. See also Lord Wright, "Ought the Doctrine of Consideration to be Abolished from the Common Law?" (1936) 49 Harv. L. Rev. 1225.

of the doctrine,[59] and also the "middle view" advocating the abolition of the doctrine only in relation to modification of existing contracts.[60] It is submitted that the enforcement of promises supported by consideration in its traditional form has not been in contention; the key issue is how far the law ought to extend the limits of enforceability to cover even promises that would otherwise not seem to be supported by consideration.

A. *Requirement of Writing*

The Court noted the proposal of the UK Law Reform Committee that "consideration is merely evidence of a serious intention to contract", with the result that it should not be required where the promise is in writing.[61] If indeed the focus of consideration is on ascertaining whether the promise was intended to have legal effect, then perhaps it should follow that if the promise is in writing, therefore indicative of this intention, there is no reason why it ought not to be enforceable for lack of consideration.

The difficulty with this view is that it leads to the arbitrary consequence that a promise scribbled in writing would be enforceable, while the very same promise made orally would not. This does not seem at all like a "rational process" developed to identify which promises will be protected by the law,[62] and the Court rightfully noted that it is "not free from difficulties".[63] Perhaps the acceptable compromise, as already recognised by the law, is for the requirement of consideration to be dispensed with for contracts under *seal*.[64]

B. *The Limited Exception of Factual or Practical Benefit*

Following *Williams*, the current state of the law, at least in England, seems to be that the promise to perform (or the performance of) an existing duty owed to the same party could constitute good consideration so long as that party had obtained a factual or practical benefit. This limited exception seems to have been brought into Singapore law by the Court of Appeal in *Sea-Land Service Inc. v. Cheong Fook Chee Vincent*.[65]

Yet even though the constraint of precedent does not tie the hands of the Singapore Court of Appeal, the exception is not without inherent difficulties. As what constitutes a factual or practical benefit is unclear, why would the promise to perform an existing duty not *always* provide a factual or practical benefit? After all, if that party did not

---

59 See K.O. Shatwell, "The Doctrine of Consideration in the Modern Law" (1954) 1 Syd. L.R. 289 and C.J. Hamson, "The Reform of Consideration" (1938) 54 L.Q.R. 233.

60 See Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 S. Ac. L.J. 566. See also *Antons Trawling Co. Ltd. v. Smith* [2003] 2 N.Z.L.R. 23.

61 *Supra* note 1 at para. 113. See also *UK Law Reform Committee Report, supra* note 58 at para. 29.

62 *Ibid.* at para. 98. See also B.J. Reiter, "Courts, Consideration, and Common Sense" (1977) 27 U.T.L.J. 439.

63 *Ibid.* at para. 116. See also Andrew Phang, "Consideration at the Crossroads" (1991) 107 L.Q.R. 21 at 23. See generally *Chitty, supra* note 36 at 3-001 and *Rann v. Hughes* (1778) 7 T.R. 350n; 4 Bro PC 27.

64 *Ibid.* at para. 65. See *Development Bank of Singapore Ltd. v. Yeap Teik Leong* [1988] S.L.R. 796 at 802, para. 28 and *Hong Leong Finance Ltd. v. Tay Keow Neo* [1992] 1 S.L.R. 205 at 223, para. 59.

65 [1994] 3 S.L.R. 631 at 635A.

find the performance worth benefiting from, he or she would presumably not have agreed to the variation of the contract. In view of these difficulties, perhaps the law should not have extended the limits of enforceability to cover promises supported by the return of ambiguous factual or practical (as opposed to legal) benefit. As with the requirement of writing, this is not a "rational process" to identify only the promises that ought to be protected by the law,[66] given the definitional uncertainty involved.

C. *A Retreat from Williams*

In the Court's view, it is axiomatic that if the doctrine of consideration is abolished, the function it has hitherto performed must then be fulfilled by alternative doctrines.[67] Yet as alluded to earlier, it is not the entire doctrine that needs to be abolished; after all it has served its purpose in the majority of cases. Rather, what needs rethinking is how far the law ought to extend the limits of enforceability, and whether this should cover even promises that would otherwise not seem to be supported by consideration.

If indeed "hard cases make bad law", and the endorsement in *Williams* of a factual or practical benefit has caused this incoherence in the law, it might be worth considering a retreat from *Williams*, to insist on the traditionally-understood requirement of only a legal benefit as sufficient for consideration. After all, this seems consistent with the reasoning that a promise to perform (or the performance of) an existing duty owed to a third party is good consideration, as the promisee is deemed to have obtained a legal right to a performance to which he or she was not previously entitled.[68]

If instead there was evidence of extortion, a *Williams*-scenario could perhaps be better dealt with by economic duress, undue influence and unconscionability.[69] Although the Court observed that unconscionability was of a "fledgling nature", and while undue influence has been relatively well established, economic duress stands somewhere in the "middle" not without difficulties of its own,[70] it is submitted that turning to these vitiating factors is more appropriate than distorting the limits of consideration, since extortion vitiates the very consent between the parties. As vitiating factors can only be relied upon where there is already a binding contract, the doctrine of consideration could be supplemented by the application of vitiating factors in the event of extortion.

D. *The Complementary Role of Promissory Estoppel*

Finally, where the requirement of a legal benefit could result in injustice, instead of distorting the rules within the common law of contract, the courts could turn to equity. Indeed in most other common law jurisdictions, the strictness of consideration has

---

66 *Supra* note 1 at para. 98.

67 *Ibid.* at para. 111; see also Richard Hooley, "Consideration and the Existing Duty" [1991] J.B.L. 19.

68 See *New Zealand Shipping Co. Ltd. v. A M Satterthwaite & Co. Ltd.* [1975] A.C. 154 (*The Eurymedon*); *Pao On v. Lau Yiu Long* [1980] A.C. 614; A.G. Davis, "Promises to Perform an Existing Duty" (1938) 6 C.L.J. 202; A.L. Goodhart, "Performance of an Existing Duty as Consideration" (1956) 72 L.Q.R. 490.

69 *Supra* note 1 at para. 113.

70 *Ibid*. at para. 114.

been "tempered by the operation of promissory estoppel".[71] The Court discussed as an alternative the doctrine of promissory estoppel, and referred to the recent English Court of Appeal decision of *Collier v. Wright*,[72] where there was a triable issue on whether the promissory estoppel could operate as an exception to *Foakes v. Beer*.

While the Court noted that the doctrine of promissory estoppel still contains "pockets of controversy" as to whether it can be used as a "sword" or merely as a "shield", the role of the concept of detriment, and whether it is only suspensory in operation,[73] it is submitted that the main reason why it has not been seen as an adequate alternative to consideration is because it operates not by way of an enforceable right, but instead as a discretion. Yet on the other hand, precisely because an estoppel acts in alternative to the common law, perhaps it is only fitting that it operates as a discretion, and that the court will do no more than "the minimum equity to do justice" between the parties.[74]

Should a retreat from *Williams* lead to a contraction of the limits of enforceability, it is submitted that what must then follow is the corresponding expansion of the scope of promissory estoppel. Although the Court acknowledged the strict English position that the doctrine could only be used as a "shield" and not as a "sword",[75] it also made reference to the Australian High Court decision of *Waltons Stores (Interstate) Limited v. Maher*[76] for the proposition that the doctrine could also be used as a "sword". The Court then concluded that "the present English position now evinces the possibility, at least, of the more liberal Australian position".[77] In view of the existing broad concept of promissory estoppel in the United States,[78] it is submitted that perhaps it is time for the Singapore courts to consider allowing the doctrine to be used also as a "sword". This would represent an advance from *High Trees*,[79] doing away with separate rules depending upon whether promissory estoppel is used as a "sword" or as a "shield".

V. Conclusion

What was significant about this decision was that even though the provisional view of the Court was to maintain the status quo, this had come after an exhaustive survey of the doctrine of consideration and its alternatives in a specially published coda. This was all the more unusual, given that the doctrine of consideration, let alone the issue of reform, was not even before the court. While the coda was indicative of prevailing judicial dissatisfaction with the aim of clarifying the state of the law, it may have had quite the opposite effect of causing uncertainty for litigants and even practitioners.

---

71 See *Reactions, supra* note 50 at 249. Jurisdictions like the U.S. and Australia have even advocated an expansive view of promissory estoppel; *Waltons Stores (Interstate) Ltd. v. Maher* (1988) 164 C.L.R. 387.

72 [2008] 1 W.L.R. 643.

73 *Supra* note 1 at para. 115.

74 See *Crabb v. Arun District Council* [1975] 3 All E.R. 865 at 880, [1976] Ch. 179 at 198.

75 *Supra* note 1 at para. 115. See *Combe v. Combe* [1951] 2 K.B. 214.

76 *Supra* note 71.

77 *Supra* note 1 at para. 115. See also *Baird Textiles Holdings Ltd. v. Marks & Spencer plc* [2002] 1 All E.R. (Comm) 737.

78 US Restatement (Second) of Contracts § 90 (1981).

79 *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130.

The Court noted that consideration is "an established part" of not only the Singapore landscape, but also the common law landscape in general, and that it remains "a standard topic in all the contract textbooks".[80] Yet it is submitted that this ought not to preclude the reform of a doctrine presently suffering from a crisis of confidence. After all, this decade has already seen the qualified "abolition" of the longstanding doctrine of privity.[81] Since the Court's view is that consideration "almost certainly needs to be reformed" when it comes squarely before the court,[82] perhaps it is time to consider a retreat from *Williams* and a corresponding advance in *High Trees*. If indeed the time has come for the common law to "shed the pretence of searching for consideration",[83] promissory estoppel could afford the courts flexibility to "achieve a just and fair result in the case",[84] but not at the expense of the coherence of the doctrine of consideration.

---

80 *Supra* note 1 at para. 117.

81 See the UK Contracts (Rights of Third Parties) Act 1999 (Cap. 31) and its equivalent in Singapore (2001) (Cap. 53B, 2002 Rev. Ed. Sing.).

82 *Supra* note 1 at para. 117.

83 *Chwee Kin Keong*, *supra* note 39 at para. 139.

84 *Supra* note 1 at para. 118.